No. 82.

Brief of Hamilton & Colbert

Appellee

Filed Oct. 19, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

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JOHN W. WARNER, ADMINISTRATOR, APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

BRIEF ON BEHALF OF APPELLEE.

G. E. HAMILTON,
M. J. COLBERT,
For Appellee.

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I.

STATEMENT OF CASE.

On June 22, 1893, the plaintiff's intestate, Joseph W. Collis, was at University station, in the county of Washington, where he had been seated for half an hour or more before the time of the accident. Shortly after 9 o'clock a local train of the defendant company was approaching Brookland from the east, and the decedent, Collis, got up from his seat and started towards the local train, which at that moment had almost come to a stop. When Collis put his foot on the west rail of the west track and started to cross over an express train coming towards the east was only forty or fifty feet away. For some

unaccountable reason Collis did not see or hear, nor did he stop to see or hear, the approaching train, which was running forty or forty-five miles an hour. Before he had time to take more than a few steps, and before he had time to clear the west track, the express train was upon him, and his death resulted almost instantly. At University, the station or depot was built on the west side of the tracks, and a platform had been erected extending from the depot to the west track, and a similar, though smaller, platform had been erected on the other side. The west platform was used by passengers alighting from or taking passage on east-bound trains, and the east platform was used by passengers on west-bound trains. At or near the point where Collis was killed a small board crossing connected the two platforms, and a person standing at the point where Collis left the west platform to cross over the tracks had a clear and unobstructed view along the tracks toward the west of more than a mile. It was claimed on behalf of the plaintiff that the engineer of the express train was negligent in not blowing his whistle or giving some timely notice of the approach of his train, and was also negligent in failing to observe the provisions of rule 441 of the company, which provided that when a passenger train is standing at a station no other train shall pass it. The court below held that the plaintiff's intestate was guilty of such negligence contributing to his injury as prevented a recovery, and directed a verdict and judgment for the defendant.

II.

There is no evidence of any negligence on the part of the defendant.

It is not claimed that any employé of the defendant other than the engineer of the express train was negligent, and the claim is that he failed to blow the usual and customary

whistle for University station, and that he was negligent in failing to stop his train before arriving at University station, while the local train was standing there, as required by rule 441.

It will be observed that there are but two witnesses produced by the plaintiff who testify to the main fact—Holledge, who testifies that the first intimation he had of the approach of the express train was a long, shrill blast, which was sounded when the express train was only 50 feet from the station; that he heard no other whistle, and that he did not see the accident; and Weeks, who testified that he was a passenger on the local train and that he did not hear or see the express train until it was within 40 feet of the deceased; that his attention was attracted by the blowing of the danger signal, which was a succession of *short, sharp* blasts, and not the long, screeching sound testified to by Holledge. The testimony of these two witnesses, coupled with the fact that the express train failed to stop before reaching University station while the local train was standing at that point, is the only evidence upon which a claim of negligence on the part of the defendant is pretended to be based.

1. It will not be seriously contended that the testimony of Holledge would warrant a verdict for the plaintiff. He was standing two squares from the station. He did not hear any danger signal, but simply heard the long blast or station whistle, and did not see the accident. He does not pretend to say that only one whistle was blown, and his testimony is purely negative. Weeks testifies that the only whistle he heard was the danger signal or succession of short blasts, and that he heard no other whistle. As against this we have the positive, certain, and unequivocal evidence of Stephens (p. 12), Reynolds (p. 14), Lee (p. 14), Hampton (p. 15), Thompson (p. 16), Hine (p. 16), Hughes (p. 16), Queen

(p. 16), Lewis (p. 17), White, who was one of the plaintiff's own witnesses (p. 17), Lloyd (p. 18), and Mrs. White (p. 18).

It has been decided many times by the Supreme Court of the United States that where the evidence is such that reasonable men might draw different conclusions from it it is necessary that the fact in dispute should be submitted to the jury.

McKey *vs.* Hyde Park Village, 134 U. S., 84.
R. R. *vs.* Powers, 149 U. S., 43.

But it is also as well established that where the evidence is such that if a verdict rendered upon it would necessarily be set aside as against the evidence or against the clear weight of the evidence it is the duty of the court, in advance, when asked to do so, to direct a verdict for the defendant.

Ins. Co. *vs.* Doster, 106 U. S., p. 30.
Kane *vs.* Ins. Co., 128 U. S., 91.

In this case we have the testimony of twelve persons testifying positively to a fact as against the negative testimony of two persons who contradict each other. It is respectfully and confidently submitted that under such a state of evidence no finding by any jury that the station whistle was not blown could be for a moment sustained. It is undoubtedly true that Holledge and Weeks were conscientious in their statements that they heard only one whistle, and it is very natural that they should not hear any other. Holledge was in an open field, engaged in cleaning his horse; Weeks was inside a car of the local train, not expecting the approach of the express train and giving no heed to its movements. We submit that the court below was right in holding that it had been established beyond question by the whole evidence that there was no negligence on the part of the defendant with respect to the express train giving timely notice of its approach to the station.

2. Was the engineer of the express train negligent in failing to stop his train and waiting until the local train had pulled out from University? In the first place, we submit that the evidence shows that when the express train passed University the local train had not come to a stop, and, in fact, moved some distance beyond the meeting point of the two trains, as testified to by Thompson (p. 15); but we concede that some of the witnesses do testify that before the express train reached University the local train had come to a full stop. The engineer of the express train testifies that he was not certain whether the local train had stopped or not; but, however that may be, we contend that there was no negligence on the part of the engineer in this respect. The fact that he violated rule 441, if he did, in fact, violate it, is no evidence of negligence. The plaintiff's intestate had no knowledge of the rule and placed no reliance upon its observance and was not misled by its breach. That regulation was a private regulation between the company and its employés governing their relations to each other, and a breach of such a rule of itself is no evidence of negligence unless the court is prepared to hold that, rule or no rule, a railroad company, as a matter of proper caution and prudence under such circumstances, should not allow any express train to pass any other train standing at any county station. But it is in evidence, and it is uncontradicted, that although this rule was in the rule book of the company, it was never observed, because it was impossible of observance and was practically a dead letter (p. 13). We assume that the court will take notice of the geography of this District. University is a station at a small—very small—country town. Between the city limits at Boundary street and the District line on the Metropolitan branch of the defendant's road there are eight such stations, separated from each other by perhaps half a mile. Assuming that express trains will run half a mile in 45 seconds, which is at the rate of 40 miles an hour, it will take an express

train just 45 seconds to pass between two such stations as Terra Cotta and University, and assuming that a local train will consume even as little as half a minute in receiving and discharging passengers and freight at each local station, it will be seen that it is physically impossible for trains to avoid passing each other at some one or more stations on the road, and to hold that a railroad company in the exercise of that care which it owes to its passengers must observe some such provision as that contained in rule 441 would render rapid transit impossible, and, as Stephens testified (p. 13), would render it impossible for express trains to make schedule time.

III.

The plaintiff's intestate was guilty of such negligence contributing to his injury as prevents a recovery.

The evidence in this case shows that the deceased in broad daylight, at a point where he had a clear and unobstructed view of the tracks for more than a mile, at a time when he was not, in the hurry of the moment, apt to omit the precautions which an ordinarily prudent man would take, at a small country station, where he knew trains were constantly passing and repassing, undertook to cross the railroad tracks in front of an express train at a moment of time when the engine of that train was only forty feet away from him, and undertook to cross over without looking or listening to see if he could make the crossing in safety.

If Mr. Collis were an ordinary traveler attempting to cross the tracks of a railroad company even at a highway or street crossing it would be too plain to admit of argument that his conduct would have been so grossly negligent that no recovery could be had for his death.

R. R. Co. *vs.* Houston, 95 U. S., 697.

Schofield *vs.* R. R. Co., 114 U. S., 615.

4 Am. and Eng. Enc. of Law, p. 70, and cases there collected.

But in this case it is contended that the decedent was a passenger entitled to all the rights of a passenger, and that by virtue of his relation to the railroad company he was exempted from the exercise of that diligence which the law requires of ordinary travelers on the streets and highways at their intersection with railroad tracks.

At the time of the accident Mr. Collis had in his pocket a ticket entitling him to ride from University to Forest Glen, and when killed he was heading towards the local train with the apparent intention of taking passage upon it. We are prepared to concede that this was sufficient evidence to warrant a finding that he was in fact a passenger, and that it was perhaps the best evidence that the nature of the case admitted of, and we are prepared to admit that under some circumstances a passenger about to board a train is entitled to rely upon the belief that the railroad company has provided reasonably safe means of entrance to and exit from its trains. Thus in the case of R. R. Co. *vs.* The State the court of appeals of Maryland held that where a passenger, in order to reach his destination, had to change cars and cross over intervening tracks, he was entitled to rely upon the faithful observance by the railroad company of such regulations as would secure a safe transfer from one train to another.

R. R. Co. *vs.* State, 60 Md., 468.

And in the case of R. R. Co. *vs.* Anderson the same ruling was affirmed.

R. R. Co. *vs.* Anderson, 72 Md., 530.

But in the former case the court was careful to add that even where a passenger was crossing from one train to another connecting train the passenger himself must exercise reasonable care, and in the latter case the court laid stress upon the fact that the passenger had knowledge of a rule of the company which provided that when a train was

discharging passengers at a station an approaching train on a parallel track must be stopped and not allowed to reach it.

In Massachusetts it was held that no recovery could be had for the death of a person caused by being struck by a railroad train while running along the track in front of it for the purpose of getting on a train approaching in the opposite direction on a parallel track.

Tuttle *vs.* Ins. Co., 134 Mass., 175.

And it was held by the same court that where a woman holding a ticket and intending to take a train approached a station of the company at a place used by the public for crossing the tracks, but was forced to wait until a freight train had passed, and after it had passed she started to cross the tracks to take passage on a train and was struck by a train following the one which she had waited to pass, she was not entitled to recover.

Wheelwright *vs.* R. R. Co., 135 Mass., 225.

In the case of Wheelock against the Railroad Company, 105 Mass., 208, cited in appellant's brief, the very meager opinion emphasizes the fact that there was some evidence that the injured passenger used his senses of sight and hearing before crossing.

In the case of R. R. Co. *vs.* Powers, 149 U. S., 43, Mr. Justice Brown made use of this language: "The question of contributory negligence could not be determined by the court unless it was affirmatively shown that the deceased when he left the car knew that he was walking along a track and that there was danger from another train, and with such knowledge *neither looked* nor took precautions to satisfy himself whether there was present danger therefrom, it cannot be held that as matter of law there was contributory negligence."

In the present case all these elements were present. It was broad daylight. The decedent lived along the line of the railroad and was familiar with the movement of its trains.

The proper signals of the approaching train were sounded. In the face of a danger that *must* have been apparent to a reasonably careful man, the decedent undertook to approach what the court of appeals of Maryland said was in itself a "warning and a place of danger," and met his death.

IV.

This case in all of its bearings was carefully considered by the court of appeals, and from the opinion of that court (Rec., pp. 21–27) it will appear, first, that upon the question of negligence of the appellee (company) the testimony before the trial court was so meager and conjectural as to bar any recovery by the plaintiff on the ground of negligence or liability in the defendant (Rec., p. 23), and, second, that the deceased placed himself in a position of obvious peril, and his death was the result immediately of his own voluntary act.

In discussing the question of contributory negligence the court of appeals says: "We regard our conclusion in this case as fully supported by one of the latest utterances of the Supreme Court of the United States upon this subject, the case of Elliott *vs.* Chicago, Milwaukee and St. Paul R. R. Co., 150 U. S., 245, in which the substantial facts were not very unlike those in the present case." The court of appeals (Rec., pp. 25 and 26) quote exhaustively from the opinion of Mr. Justice Brewer in that case, and, applying it to the case at bar, conclude with "the well-known rules of law here repeated by Mr. Justice Brewer would seem to apply with equal force to the case before us."

The contention made by the plaintiff that the ordinary rules as to negligence and contributory negligence did not apply to the case at bar, because of the fact that the deceased was the holder of a ticket and therefore entitled to the immunity and protection due from a common carrier to its passenger, is also very fully considered by the Court of Appeals, and the authorities relating to this question carefully

examined and discussed. The court, well recognizing the duty of common carriers to passengers, held that the extent of the immunity and protection imposed by this duty will differ under different circumstances. In its opinion (Rec., p. 23) the court says:

"It certainly cannot be claimed with reason that the immunity extends so far as to guarantee all the acts of a person who has in his possession a ticket entitling him to transportation. When the common carrier has provided all the appliances that can reasonably be required from it, no further liability on its part can accrue to the benefit of the passenger or proposed passenger until the latter manifests by some overt act that he proposes forthwith to exercise the right of transportation to which he has become entitled. In exercising this right the passenger must also exercise the ordinary care and caution which any reasonable man would exercise under similar circumstances. He is not entitled with impunity to stand upon or cross the tracks of a railroad company or to enter its trains at an unusual place or in an unusual way or to leave them in any different place or way, or otherwise to disregard the usual safeguards which every person of reasonable mind and sufficient intelligence recognizes as right and proper to be observed when dealing with the modern instrumentalities of rapid transit, unless there has been some inducement, express or by implication, held out by the common carrier or its agents that one may depart therefrom without danger. A course of conduct pursued or tolerated may amount to such inducement. Usage or custom may constitute an inducement, and so may the special necessities of any situation. Various cases that have been cited in the argument of this case are based upon this theory, such as The Baltimore and Ohio Railroad Company *vs.* Haner, 60 Md., 463; The Phil., Wilm. & Balt. R. R. Co. *vs.* Anderson, 72 Md., 529; Terry *vs.* Jewett, 78 N. Y., 343; Jewett *vs.* Klein, 27 N. J. Eq., 550, and Atchison, Topeka & Santa Fe R. R. Co. *vs.* Shean, 18 Col., 368. In all these cases it appeared that there was assurance of some kind, direct or indirect, expressed or implied, by the common carrier to the person injured that the latter might do with safety what he assumed to do; but, in the absence of any such assurance, we fail to see, either from reason or from authority, why a common carrier should be held responsible for the departure

of a passenger or intending passenger from the ordinary rules of prudence or common sense.

"It has been repeatedly said that the very presence of a railroad track is itself notice of danger, and no man of ordinary intelligence has the right to go upon it without taking the ordinary precaution of stopping and looking for approaching trains. A passenger or intending passenger is equally with other persons bound by this rule except where, by the action of the common carrier, he has been reasonably induced to believe that there is no occasion for its observance. Where he has been induced to alight from a car on the side opposite from the platform, although the presence of another track there and the possibility of the passage of other trains on that track constitute an element of danger, he is entitled to immunity in consequence of the inducement. So, where he must cross a track in order to take another train to continue his journey, he is entitled to presume that he may do so in safety. And numerous other instances may be cited from adjudged cases in which parties have been held entitled to recover for injuries sustained by them when it appeared that they risked danger in consequence of representations held out to them that the situation was free from danger. But where there has been no inducement or representation of any kind, and a person has by his own voluntary act, as in the present case, assumed a position of obvious danger, although no doubt the deceased did not fully realize the extent of his danger and his sad mishap was in all probability the result of some sudden impulse that induced him to forget or ignore the danger for the time, yet his action was not any the less contributory negligence in law, and it should not be charged to the account of the defendant. There is total failure of proof on the part of the plaintiff to show any inducement by the defendant to the deceased that would tend in any manner to justify or excuse the action of the latter. This, as we have intimated, may be his misfortune rather than his fault, but whatever may be the cause of it the fact exists and we cannot ignore it."

It is respectfully submitted that the judgment below should be affirmed.

G. E. Hamilton,
M. J. Colbert,
For Appellee.